In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 40

TERRITORY OF ALASKA, *Petitioner*,

vs.

AMERICAN CAN COMPANY, FIDALGO ISLAND PACKING COMPANY, LIBBY, McNEILL & LIBBY, INC., NAKAT PACKING CORPORATION, NEW ENGLAND FISH CO., P. E. HARRIS COMPANY, INC., PACIFIC & ARCTIC RAILWAY & NAVIGATION CO., and OCEANIC FISHERIES CO., *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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STATEMENT OF THE CASE

Petitioner has set forth a reference to the opinions delivered in the courts below, together with a statement of the questions presented which is in accordance with the Petition for Certiorari. Petitioner has also listed the constitutional provisions and statutes which it contends are applicable. We do not agree that the Fourteenth Amendment has any application to cases arising in Alaska during territorial status.

Respondents feel that the statement of the case as presented by petitioner is designed to create the impression that respondents are tax evaders and law violators. In order to further this impression petitioner has included statements not supported by the record or advanced below prior to petition for rehearing in

the Circuit Court. We refer to the statement on page 6 of petitioner's brief to the effect that 11,504 people paid the tax here in question and that 8,689 did not. This statement is not supported by the record in this case. Respondents have had no opportunity to rebut it. Nor does petitioner disclose that the Territory was refusing proffered payments of the tax levied and due under the Alaska Property Tax Act pending determination of its validity. See Appendix C, page 45.

For these reasons and in order that the Court may know the entire background of the legal and legislative controversy respecting the Alaska Property Act and its repeal we set forth a Chronological Statement of the Controversy.

CHRONOLOGICAL STATEMENT OF CONTROVERSY

1. *February 21, 1949*

The Alaska Property Tax Act, hereinafter in this Chronological Statement, called the Act, was passed and approved February 21, 1949 (Chap. 10 SLA 1949).

2. *December 2, 1949*

On December 2, 1949, and before any taxes were due under the Act, Luther (Lester) C. Hess brought an action in the United States District Court at Fairbanks, against M. P. Mullaney, Commissioner of Taxation for the Territory of Alaska, challenging the validity of the Act and seeking to enjoin its enforcement (P. 2, Transcript of Record, United States Court of Appeals for the Ninth Circuit, No. 12, 675, *M. P. Mullaney, Commissioner of Taxation, Territory of Alaska v. Luther C. Hess and Alaska Juneau Gold Mining Co.*),

Hess v. Mullaney, D.C. Alaska, 1950, 12 Alaska 696, 91 F.Supp. 139.

3. *January 30, 1950*

On January 30, 1950, and before any taxes were due under the Act, a Preliminary Injunction was issued by the United States District Court at Fairbanks, restraining Mullaney, the Tax Commissioner, from enforcing the Act (P. 33, Transcript of Record, United States Court of Appeals for the Ninth Circuit, No. 12, 675, *M. P. Mullaney, Commissioner of Taxation, Territory of Alaska v. Luther C. Hess and Alaska Juneau Gold Mining Co.*), *Hess v. Mullaney, supra.*

4. *June 19, 1950*

On June 19, 1950, the United States District Court at Fairbanks rendered an opinion holding the Act to be invalid and permanently enjoining its enforcement. *Hess v. Mullaney, supra.*

5. *February 10, 1951*

On February 10, 1951, and while the permanent injunction enjoining enforcement of the Act was still in effect, House Bill No. 41, "An Act to repeal Chapter 10 of the Session Laws of Alaska, 1949, known as the Alaska Property Tax Act, as amended by Chapter 88, Session Laws of Alaska, 1949," was introduced in the Territorial Legislature, then in session (Journal of the House of Representatives, Territory of Alaska, Twentieth Session (1951) P. 236). Counsel for Respondents advised their clients that if House Bill No. 41 was enacted into law that their liability would be limited to taxes levied under the Act for the years 1949 and 1950

even if the Act was declared valid on the pending appeal. No liability is asserted against three of these respondents for those years (R. 25, 29, 37). Liability is asserted against a fourth respondent for only one of those years (R. 33).

6. *March 13, 1951*

On March 13, 1951, and while the permanent injunction enjoining enforcement of the Act was still in effect, House Bill No. 41, "An Act to repeal Chapter 10 of the Session Laws of Alaska, 1949, known as the Alaska Property Tax Act, as amended by Chapter 88, Session Laws of Alaska, 1949," was passed by the Territorial House of Representatives by a vote of 14 to 10 (Journal of the House of Representatives, Territory of Alaska, Twentieth Session (1951) P. 758). It was transmitted to the Territorial Senate then in session, but since it arrived after the forty-fifth day it could only be received under suspension of the rules and the rules were not suspended (Senate Journal of the Twentieth Legislature, Territory of Alaska (1951) P. 596).

7. *May 10, 1951*

The case of *Hess v. Mullaney, supra,* was appealed to the United States Court of Appeals for the Ninth Circuit and on May 10, 1951, the Appellate Court ruled that an injunction was not the proper remedy because there was a remedy at law. The court held that the tax could be paid under protest and a suit brought to recover. The court did not pass on the validity of the Act, or criticize the view expressed by the trial court that the Act was invalid. *Mullaney v. Hess,* 189 F.2d 417, 13 Alaska 276.

8. *June 8, 1951*

Hess paid the tax under protest and on June 8, 1951, brought a suit against Mullaney, Commissioner of Taxation, seeking to recover the tax (P. 5, Transcript of Record, United States Court of Appeals for the Ninth Circuit, No. 13,533, *Luther C. Hess and Alaska Juneau Gold Mining Co. v. M. P. Mullaney, Commissioner of Taxation,* Certiorari denied, October Term 1954, No. 266, 348 U.S. 836, 75 S.Ct. 50).

9. *February 18, 1952*

The District Court at Juneau filed an opinion on February 18, 1952, holding the Act to be valid and denying recovery to Hess. The decision was a variance with the previous holding by the District Court at Fairbanks, thus creating a conflict of opinion which could only be settled by the Appellate Court. *Hess v. Mullaney,* 13 Alaska 564, 102 F.Supp. 430.

10. *July 8, 1952*

Final action in the case was delayed and the trial court did not act until July 8, 1952, when Judgment and Decree dismissing the action were entered (P. 68, Transcript of Record, United States Circuit Court of Appeals for the Ninth Circuit, *Hess v. Mullaney,* No. 13,533).

11. *August 4, 1952*

The case was appealed to the United States Circuit Court of Appeals for the Ninth Circuit August 4, 1952 (P. 71, Transcript of Record, United States Circuit Court of Appeals for the Ninth Circuit, *Hess v. Mullaney,* No. 13,522).

12. *January 27, 1953*

On January 27, 1953, and before the taxes levied under the Act for 1952 were due, House Bill No. 3 repealing the Act and abrogating and repealing all accrued and unpaid taxes levied thereunder, was introduced in the Territorial Legislature which was then in session (Journal of the House of Representatives, Territory of Alaska, Twenty-first Session (1953) p. 45). Counsel for respondents advised their clients that passage of House Bill No. 3 would extinguish liability for taxes levied under the Act even if the Act was declared valid on the pending appeal.

13. *January 28, 1953*

On January 28, 1953, and before the taxes levied under the Act for 1952 were due, Senate Bill No. 5 repealing the Act and abrogating and repealing all accrued and unpaid taxes levied thereunder, was introduced by the President and ten other members of the Territorial Senate. The Territorial Senate is composed of a total of sixteen members and was then in session (Senate Journal of the Twenty-first Iegislature (1953) of the Territory of Alaska, p. 32). Counsel for respondents advised their clients that passage of Senate Bill No. 5 would extinguish liability for taxes levied under the Act even if the Act was declared valid on the pending appeal.

14. *March 12, 1953*

On March 12, 1953, and while the case was still pending on appeal, the Territorial Legislature enacted Chapter 22 Session Laws of Alaska, 1953, hereinafter called the Repealing Act. By the terms of the Repeal-

ing Act as understood by counsel for respondents and as later construed by the trial court and the Circuit Court of Appeals, the tax liability of respondents was extinguished and as stated by the Circuit Court "is no longer of any force or effect—as to past, present, or future years." Counsel for respondents so advised their clients.

15. *May 25, 1954*

The Circuit Court affirmed the District Court on May 25, 1954, and held the Act valid. *Hess v. Mullaney,* 15 Alaska 40, 213 F.2d 635. Certiorari denied. *Luther C. Hess, et al., Pet. v. Karl F. Dewey, Commissioner of Taxation of the Territory of Alaska, No. 266,* 348 U.S. 836, 75 S.Ct. 50.

16. *April 9, 1955*

Between April 9th and May 31st, 1955, the Territory of Alaska commenced the pending actions in the United States District Court at Juneau, seeking collection of taxes and interest for the years 1949-1952 inclusive, against four of the respondents and for the years 1950-1951 and 1952 only, against one respondent, and for the years 1951-1952 only, against three of the respondents (R.. pages 1 to 39 inc.).

17. *January 4, 1956*

On January 4, 1956, the United States District Court at Juneau rendered an opinion dismissing complaints in all actions on the ground that a personal action could not be maintained for the collection of taxes levied on property pursuant to the Act and upon the further ground that the taxes levied for the years in question did not survive the repeal. The court in its opinion

stated that in view of the holding, it was unnecessary to consider the question of the Statute of Limitations (R. 56). *Territory of Alaska v. American Can Co., et al.*, 16 Alaska 71, 137 F.Supp. 181.

18. *February 7, 1956*

On February 7, 1956, the Territory appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the order dismissing the complaints (R. 70).

19. *November 14, 1956*

On Nofember 14, 1956, the Circuit Court of Appeals dismissed the action from the bench for want of jurisdiction because of the lack of a Final Judgment (R. 80). *Territory of Alaska v. American Can Co., et al.*, 246 F.2d 493.

20. *December 11, 1956*

On December 11, 1956, Final Judgment was entered in the District Court at Juneau and a new appeal taken (R. 80). *Territory of Alaska v. American Can Co., et al.*, 246 F.2d 493.

21. *June 27, 1957*

The Circuit Court rendered its opinion holding that the taxes in question did not survive the repeal and that it was not necessary to pass on the question of whether or not a personal action could be maintained (R. 77) 246 F.2d 493.

22. *July 25, 1957*

On July 25, 1957, a petition for rehearing was filed in the Circuit Court (R. 92).

23. *December 4, 1957*

Petition for rehearing was denied on December 4, 1957 (R. 94).

24. *February 21, 1958*

Petition for certiorari was filed in the United States Supreme Court (Petition, p. 17).

25. *April 7, 1958*

Certiorari was granted (R. 95)| *Territory of Alaska, Pet. v. American Can Co., Fidalgo Island Packing Co., Libby, McNeil & Libby, Inc., et al., No. 833,* — U.S. —, 78 S.Ct. 717.

Summary

Thirty-seven months elapsed between February 1, 1950, when taxes levied under the Act first became due, and March 12, 1953, when the Act was repealed.

During the first fifteen months of this period the Territory was enjoined from enforcing the Act and during part or all of that period the Territorial Tax Commissioner was refusing to accept payment of the tax and during thirty days of the periods the Territorial Legislature was actively considering repeal of the Act.

During the last twenty-two months of the period the opinion oft he District Judge at Fairbanks, holding the Act invalid, had not been overruled and during eight months of that period it was the law of Alaska; during the last six weeks of such period it was reasonably apparent that the Act would be repealed.

During the entire thirty-seven months that the Act was in effect and for an additional thirty-seven months thereafter, the Territory made no effort to enforce payment of the tax.

SUMMARY OF ARGUMENT

A. The Constitutional Question.

The Petitioner did not raise any constitutional question in the courts below and does not really desire the court to declare the statute unconstitutional. No such relief is requested by the pleadings. The constitutional question was raised to bring the case within the rules respecting certiorari. Petitioner has no capacity to raise the constitutional question either here or below. The unconstitutional discrimination if it existed, could injure only those who paid taxes under the Repealing Act. Petitioner is not of that group and cannot represent the group or champion any alleged right except its own. Nor is the Constitution offended. The Fourteenth Amendment does not apply during territorial status. The Fifth Amendment contains a "due process" clause only and there was no lack of "due process" here. Nor is the Repealing Act in violation of the Alaska organic law which the Ninth Circuit Court has said requires no greater measure of uniformity and equality than the Fourteenth Amendment and that under the rule laid down in *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 60 S.Ct. 406, a classification such as alleged to exist here is a valid exercise of the legislative power. The majority of the cases cited by the Petitioner involve legislative efforts to remit or forgive penalty, interest or a portion of the tax under current and continuing tax statutes in states where such action was contrary to a provision of the state constitution not found in the United States Constitution. Only one of the cases construes an act repealing a tax statute and there the decision turned on a provision of

the state constitution and a finding that the repealing act was prospective only. The case arose in Florida where the state court both before and after the decision applied the universal rule that "the effect of the repealing statute is to obliterate the statute repealed as completely as if it had never been enacted, except for the purposes of those actions or suits that were commenced, prosecuted, and concluded while it was an existing law."

B. The Taxes Did Not Survive the Repeal

Under the common law the repeal of a statute extinguished all penalties and liabilities created by the statute and unpaid on the date of repeal unless the same are kept alive by a specific saving clause. The rule applies to repealed tax statutes, and was established in England before the adoption of the Federal Constitution, it was reiterated by Justice Washington in 1804 and has been followed in many decisions of this court since. It was applied by the Second Circuit in construing the Portal to Portal Act and by the Ninth Circuit in construing the repeal of the National Prohibition Act. The rule has been announced in many state courts. There is no authority to the contrary. Petitioner does not challenge this principle but contends that the saving section of the Repealing Act does not override the earlier general saving statute and that therefore all taxes due under the Act at the time of its repeal were saved and not just the taxes which the Repealing Act specifically directed should be saved. This question was determined squarely against Petitioner in the courts below. The reasoning of the Appellate Court as set forth in its decision cannot be successfully challenged.

The rule applied there has been stated and followed by this court and in several of the circuits. It is well established in California, Kansas and a legion of other states. By reason and authority the taxes levied and due under the Alaska Property Tax Act on the date of its repeal were, with the exception of those taxes specifically saved (and not involved here), in the words of the Appellate Court "no longer of any force or effect —as to past, present or future years."

C. There Was No Error in the Rejection of Evidence

There was no error in the rejection of House Bill No. 3 offered in evidence in the District Court during argument on a Motion to Dismiss or refusal of the Appellate Court to consider Senate Bill No. 5 not offered in evidence in the District Court but inserted in the record on appeal by Petitioner. The case was not open for the reception of evidence in the District Court or the Appellate Court and the situation is no different here. The Appellate Court concluded that the proffered documents shed no light on the controversy not available from an inspection of the legislative journals which may be judicially noticed. Respondents agree. The legislature did not want to "abrogate and repeal all accrued and unpaid taxes," as provided in House Bill No. 3 as introduced. It wanted to except from the repeal and save taxes levied in the past or to be levied in the future pursuant to the Repealing Act by municipalities, school and public utility districts. The legislature amended the bill accordingly.

D. Statutory Construction

The rules of statutory construction advanced by Pe-

titioner may be true in the most part but they are not applicable here.

E. Miscellaneous

The Statute of Limitations is applicable and was pleaded by respondents below. The trial court held that no personal action could be maintained against these respondents and that neither the tax nor remedy survived the repeal and that "in view of this decision the question of the Statute of Limitations need not to be considered." The Circuit Court held that the taxes did not survive the repeal and therefore did not consider either the question of personal liability or the Statute of Limitations. These questions are not covered by the Petition for Certiorari and are not before this court. However, they are meritorious.

ARGUMENT

First Question Presented

Petitioner by the first question presented in its brief, asserts on page 16 thereof, that the special saving clause of Chap. 22, SLA 1953, repealing the Alaska Property Tax Act, violates the due process and equal protection clauses of the Fourteenth Amendment and is also violative of Section 9 of Alaska's Organic Act. We question whether the Territory seeks that result. It was not requested in the pleadings or suggested in the courts below.

It seems apparent that Petitioner does not really seek to have the Repealing Act set aside on constitutional grounds, but rather to have this court overrule the decision of the Circuit Court holding "that with respect to the taxes here in question, Chap. 10, SLA 1949, is no longer of any force or effect — as to past,

present or future years." The constitutional question is posed in order to bring the case within the scope of the rules and precedents of this court respecting the granting of *certiorari*. The decision of the trial court reaches the identical result with that of the Circuit Court and is based on similar reasoning and the same authorities. Petitioner saw no constitutional questions on appeal from that decision.

But this is not all. Even if the constitutional questions had merit, still Petitioner has no capacity or authority to raise it either here or below.

Petitioner Has No Capacity to Raise Constitutional Question

Petitioner would have the court declare the Repealing Statute unconstitutional. But the court will grant such relief in proper cases only by enjoining enforcement of the invalid statute by officials charged with the duty of enforcing it. Such officials are not before the court unless it be the Attorney General of Alaska who appears here for Petitioner. Petitioner's counsel can hardly seek an order against himself.

> "The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws, to the executive the duty of executing them, and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct, or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials. *Gaines v. Thompson*, 7 Wall. 347, 19 L.ed. 62. We have no power *per se* to review and annul acts of Congress on the ground that they are

unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding." *Commonwealth of Massachusetts v. Mellon, Secretary of the Treasury,* 262 U.S. 447, 488; 43 S.Ct. 597, 601.

Long ago Justice White in *Del Castillo v. McConnico,* 168 U.S. 674; 18 S. Ct. 229, 232, a case similar to the one at bar said, "The plaintiff in error has no interest to assert that the statute is unconstitutional, because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether, in the case of petitioner, the effect of applying the statute is to deprive *him of his property* without due process of law." (Emphasis supplied.) Petitioner's property was not taxed. "The mere fact that a state is plaintiff is not enough," *Florida v. Mellon,* 273 U.S. 12, 47 S.Ct. 265, 266, and a territory has no better standing than a state. *Puerto Rico v. Secre-*

tary of Agriculture, 338 U.S. 604, 70 S.Ct. 403. See also *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 56 S.Ct. 466, 472. *Georgia v. Pennsylvania,* 324 U.S. 439, 65 S.Ct. 716. The alleged discrimination, inequality and failure of due process of law, if it existed, could injure only those people who paid taxes levied under the act before its repeal. Petitioner is not of the group and cannot represent the group. As Mr. Justice Cardoza said in *Henneford v. Silas Mason Co.,* 300 U.S. 577, 583, 57 S.Ct. 524, 527, 81 L.ed. 814, "the plaintiffs are not the champions of any rights except their own."

The Constitution Is Not Offended

Nor do we think the Constitution or the Alaska Organic Act is offended by the "Special Saving Clause" or any other part of Chap. 22 SLA 1953, hereinafter called the Repealing Act.

First of all, this case arose under territorial status and the Fourteenth Amendment upon which Petitioner relies applies only to the sovereign states. *Boling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693, and has no force in the territories, *Farrington, Governor v. Tokushige,* 373 U.S. 234, 47 S.Ct. 406.

In *Farrington, Governor v. Tojushige, supra,* involving application of constitutional restrictions to territorial legislation, the court applied the "due process" clause of the Fifth Amendment and not the similar language of the Fourteenth Amendment.

The Fourteenth Amendment Not Violated

If the Fourteenth Amendment were applicable it would require that the Repealing Act be tested against

the "due process" and "equal protection" clauses, of that Amendment. Where is the violation? There certainly has been no denial of due process of law. The Fifth Amendment which is applicable under territorial status, contains a "due process" clause also. Its application is discussed *infra.*

This leaves the "equal protection" requirement. If the Repealing Act denies equal protection of the laws it must be because the Territorial Legislature is inhibited from repealing its own tax laws without including a provision excepting unpaid taxes from the repeal. Such a restriction of the legislative power finds no support in the Alaska Organic Act wherein Congress provided that the legislative powers "should extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." Section 9 *Organic Act of Alaska,* 37 Stat. 514, Sec. 77, Title 48 USC. Section 3 of the same Organic Act provided that with exceptions not material here "all laws now in force in Alaska shall continue in full force and effect until amended or repealed by Congress, or the legislature [of Alaska]." Section 3 of the Organic Act of Alaska, *supra.* Among those laws was Section 796, Compiled Laws of Alaska 1913, extending the common law to Alaska and now found with amendments in Alaska Compiled Laws Annotated, 1949, Sec. 2-1-2 thereof.

The common law requires exactly the opposite conclusion contended for by Petitioner. Under the common law the repeal of a statute extinguishes all penalties and liabilities created by the statute and unpaid on the date of repeal unless the same are kept alive by a specific saving clause. The rule applies to repealed tax stat-

utes and was well established in England before the adoption of the Federal Constitution. *Rex v. Justices of London,* 3 Burr. 1456. It was reiterated in 1804 by Justice Washington in *United States v. Passmore,* 4 Dallas 372, 1 L.ed. 871. See also *Norris v. Crocker,* 13 How. 429, 14 L.ed. 210; *Ex parte William McCardle,* 7 Wall. 506; 19 L.ed. 264; *Flanigan v. County of Sierra,* 196 U.S. 553, 25 S.Ct. 314. *Hertz v. Woodman,* 218 U.S. 205, 30 S.Ct. 621. It was applied by Circuit Court of Appeals in construing the Portal to Portal Act. *Bottogala v. General Motors* (2d Cir. 1948) 169 F.2d 254. Also by the Circuit Court for the Ninth Circuit in construing the repeal of the National Prohibition Act, *Green v. United States,* 67 F.2d 846, where *Flannigan v. County of Sierra,* which applied to the construction of a repealed tax statute, is cited with approval. See also *Wilmington Trust Co. v. United States* (D.C. Del.) 28 F.2d 205. There is no authority to the contrary. State decisions supporting this rule are legion. See *Crow v. Cartledge* (Miss. 1911) 54 So. 947; Annotated Cases 1913 E 470 and note. The note beginning on page 471 of Annotated Cases 1913 E deals with the "effect of repeal of statute imposing license fee or tax, on tax due but unpaid." The author states:

> "It is a well settled rule, with which the reported case is in accord, that in the absence of a special provision therefor, the repeal of a statute which imposes a license fee or tax has the effect of abrogating all rights to the collection of a license fee or tax obtained under the statute as effectually as if it had never been in force."

Authorities are cited from England, Indiana, Iowa, Mississippi, Maine, Pennsylvania, Alabama, and New

Jersey. See also *Vance v. Rankin,* (Ill. 1902) 62 N.E. 807, and many federal and state cases there cited. The rule was applied in Wyoming in 1942 in *Robinson v. Gallagher,* 125 P.2d 157, and in 1953 by Arizona in *Gustafson v. Rajkovich,* 263 P.2d 540.

This principle was not challenged by Petitioner in the courts below and in no decision of this Court or of the Circuit or District Courts has it been suggested that application of this long-standing rule of the common law violated any provision of the United States Constitution. Congress saw no constitutional interference, with this established principle of the common law, when it passed a general saving statute in 1871, before the Alaska legislative assembly was created. If the Constitution is not offended neither is the Alaska Organic Act.

Nevertheless, Petitioner asserts on page 15 of its Brief that the Repealing Act violates the provisions of the *Alaska Organic Act, supra,* requiring that:

> "All taxes shall be uniform on the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the true and full value thereof, * * * ."

This contention is not elaborated further. The provisions of the Alaska Organic Act quoted, clearly applied to laws imposing taxes and not to laws repealing tax acts. Furthermore, as was said by the Circuit Court of Appeals for the Ninth Circuit in *Alaska Steamship Co. v Mullaney,* 180 F.2d 805, 817, 12 Alaska 594, 619, this provision of the Alaska Organic Act "requires no greater measure of uniformity and equality than does the equal protection requirement of the Fourteenth Amendment."

The only basis upon which the Repealing Act could offend the language of section 9 of the Alaska Organic Act above, is that the language of the Repealing Act saving some taxes and not others constitutes an arbitrary and unreasonable classification such as would violate the Fourteenth Amendment if it were applicable. This seems to be the argument advanced by Petitioner on page 12 of its Brief.

This contention will not stand examination. First, the saving clause of the Repealing Act has nothing to do with the assessment of taxes but only with their collection. This Court in *Tappan, Collector of Taxes, etc., v. The Merchants National Bank of Chicago* (1873), 86 U.S. 490, 504, 22 L.ed. 189, 195, speaking through Chief Justice Waite said:

> "The constitution does not require uniformity in the manner of collection. Uniformity in the assessment is all it demands."

Second, the charge that Territorial tax legislation established arbitrary and unreasonable classification has been considered by the courts before. Once in connection with the Alaska Property Tax now repealed, and which is the basis in the Territory's claim in this case. See *Hess v. Mullaney*, 213 F.2d 635, 15 Alaska 40, wherein the Circuit Court held that the different treatment accorded to property outside municipalities, school and public utility districts on the one hand and property within such municipalities and districts on the other, by the Alaska Property Tax Act, did not contravene section 9 of the Alaska Organic Act. The Circuit Court cited its previous decision in *Alaska Steamship Company v. Mullaney*, 180 F.2d 805, 12 Alaska 594,

reaching the same results in construing the Alaska Net Income Tax law.

Both Circuit Court cases cited the decision of this Court in *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 60 S.Ct. 406. In that well-known case Justice Reed, speaking for the court, pointed to the broad discretion as to classification possessed by a legislature in the field of taxation and said:

> "Since the members of a legislature necessarily enjoy a familiarity with local conditions which this court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."

This burden is one that Petitioner cannot carry and has not attempted to carry. Where is the showing by "the most explicit demonstration" that the classification established by the Repealing Act, if it is a classification, is a "hostile and oppressive discrimination." Petitioner has made no attempt to negative any basis which might support the alleged classification, whether "conceivable" or otherwise.

The classification, if it is a classification, differentiates between those whose property is within municipalities, school and public utility districts, and those whose property is outside. This is a classification specifically approved in *Hess v. Mullaney, supra,* at the urging of this Petitioner.

Under the common law rules the taxes not saved by the repeal become non-existent. The Legislature must

be presumed to have known this and to have had a reason for their action. As said in *Madden v. Commonwealth of Kentucky, supra,* they "necessarily enjoy a familiarity with local conditions which this court cannot have," they might well have considered the refusal of the Tax Commissioner to accept proffered tax payments (Appendix C) or the fact that some municipalities refused to levy the tax provided for by the act, *Hess v. Mullaney,* 213 F.2d 635, 642, 15 Alaska 40, 51. The Legislature may have anticipated that the act would be declared invalid in which event those who had paid under protest could recover. The Legislature could have, but was under no legal obligation to refund taxes paid prior to the repeal. The decision might well have been postponed pending the outcome of the pending appeal. There are a myriad of reasons which could have impelled the Legislature. None of those suggested constitute "a hostile and oppressive discrimination against particular persons and classifications."

The Fifth Amendment

Although not raised in the questions presented in the Petition for Certiorari or in the questions presented in the Brief on its Merits, Petitioner on page 15 of its Brief, asserts that the Repealing Act constitutes a denial of the "due process" clause of the Fifth Amendment. The proposition is not further elaborated by Petitioner. No authority is cited and none is known to exist. It is difficult to envisage application of the principle here. Who is being deprived of property without due process of law? Certainly not Petitioner. No claim is made or could be made that the Territory has any property involved here. The contention is that people

who paid taxes under the Alaska Property Tax Act prior to its repeal are being deprived of their property without due process of law by the Repealing Act. But these people did not lose their property because of the Repealing Act. They lost by virtue of the Alaska Property Tax Act which snbjected their property to the tax. There was no denial of due process by the Alaska Property Tax Act. The validity of the Act was contested on that very ground. It was held valid as against that objection by the Circuit Court of Appeals in *Hess v. Mullaney,* 15 Alaska 40, 213 F.2d 635. Petition for Certiorari asserting violation of the Fifth Amendment was denied. *Luther C. Hess, et al., Pet. v. Karl F. Dewey, Commissioner of Taxation of the Territory of Alaska, No. 266,* 348 U.S. 836, 75 S.Ct. 50.

This contention with reference to the Fifth Amendment has been made before under similar circumstances and without success.

In *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 400, 60 S.Ct. 907, 916, Justice Douglas speaking for this court said:

> "Appellant contends that the statutory classification * * * and the application of the * * * tax * * * are improper under the Fifth Amendment. Its objection is not premised on lack of due process nor could it be in view of the elaborate machinery and procedure for the act's enforcement which Congress has provided. Rather appellant's objection is founded on its claim of discrimination. But the Fifth Amendment, unlike the Fourteenth, has no equal protection clause."

This court was equally specific in *Helvering v. Lerner Stores,* 314 U.S. 463, 468, 62 S.Ct. 341, 343, where Jus-

tice Douglas pointed out that the contention that the provisions of the act, there under consideration, run afoul of the Fifth Amendment was without merit and said that "a claim of unreasonable classification or inequality in the incidence of the application of a tax, raises no question under the Fifth Amendment which contains no equal protection clause."

Again in *Detroit Bank v. United States,* 317 U.S. 329, 337, 63 S.Ct. 297, 301, this court declared that "unlike the Fourteenth Amendment the Fifth Amendment contains no equal protection clause and provides no guaranty against discriminatory legislation by Congress."

The Florida Cases Cited by Petitioner on the Constitutional Question

The five Florida cases cited by Petitioner are *Simpson, County Tax Collector, v. Warren,* 106 Fla. 688, 143 So. 602; *State v. Butts,* 111 Fla. 630, 149 So. 746; *Richie v. Wells,* 123 Fla. 284, 166 So. 817; *Ranger Realty Company v. Mills,* 102 Fla. 378, 136 So. 546; *St. Lucie Estates v. Ashley,* 105 Fla. 534, 141 So. 738. These cases all deal with efforts of the legislature of Florida either directly or by delegation of authority, to waive penalties, interest and in some cases a portion of the tax levied and due under current and continuing tax statutes. The Florida Supreme Court at an early date held that such action violated Article IX, Sec. 2, of the 1885 Constitution of Florida as amended, providing for "a uniform and equal rate of taxation." Some of these cases also infer that the legislative act under review was in violation of the Fourteenth Amendment. The cases are far from specific and can hardly be considered

as authoritative except in construction of the constitution of Florida. In three of the five cases cited the legislative acts involved were held valid and the language of the decisions respecting acts which might or would be invalid if enacted are merely *dicta*. In one of the two cases cited invalidity was based principally on an invalid delegation of power.

There is no implication in any of these cases that either the state or federal constitution prohibits the legislature from repealing the tax laws of Florida or that such a repeal without a provision saving all accrued taxes would be a violation of the state or federal constitution.

In fact the opposite conclusion is reached by reading *Pensacola and Atlantic Railroad Co. v. State* (Fla. 1903) 45 Fla. 86, 33 So. 985, 110 American State Reports 67, decided before any of the Florida cases cited by Petitioner, and *Lee, Comptroller, v. Larry, Clerk,* (Fla. 1939) 192 So. 490, decided after the Florida cases cited by Petitioner. Both of these decisions lay down the rule that "the effect of the repealing statute is to obliterate the statute repealed as completely as if it had never been enacted, except for the purpose of those actions or suits that were commenced, prosecuted, and concluded while it was an existing law." In neither case is there any suggestion that the application of the rule in tax cases meets a constitutional obstacle.

Other State Cases Cited by Petitioner on the Constitutional Question

None of the other cases cited by Petitioner are helpful here. Not a single one of them involves the question

of the survival of taxes after repeal; or the construction of general and special saving statutes.

In *State v. Armstrong,* 17 Utah 166, 53 Pac. 981, the Utah Supreme Court was confronted with a provision of the State Constitution directing that—"all property in the state not exempt under the laws of the United States, or under this Constitution, shall be taxed in proportion to its value, to be ascertained as provided by law." The constitution then exempted certain property not including the property in question. The court cited an earlier decision of Utah construing this constitutional provision to mean—"that no power should exist in the state government to grant exemptions other than those mentioned in the constitution."

Sheppard, et al., v. Hidalgo County, et al., 125 Tex. 294, 83 S.W.2d 649, 653, held invalid an act of the legislature releasing inhabitants of a single county in Texas from payment of state taxes levied on their property for a period of twenty-five years in the future. The court held the act in contravention of a provision of the Texas Constitution requiring that "all property in this state whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value."

Lincoln Mfg. and Trust Co. v. Davis, 76 Kan. 639, 92 Pac. 707, is directly against Petitioner's contention. In that case the Kansas Supreme Court in 1907 held that "the legislature may, without violating the principle that the rate of assessment of taxation must be uniform and equal, allow a remittance of a part of the tax against delinquent lands which have already remained unsold for three years."

In *State ex rel. Coe v. Tyler,* 48 Conn. 145, a Con-

necticut town meeting had sought to lower the assessed valuation placed on the property of a local manufacturing plant by the "Board of Relief" the statutory agency authorized to review assessments. The court held that action of the town was contrary to statute and void.

The Supreme Court decision in *Huntington v. Worthen and Little Rock and Fort Smith Railway,* 120 U.S. 97, 30 L.ed. 591, construes and applies a provision of the Constitution of Arkansas providing that "all laws exempting property from taxation other than as provided [by the Arkansas Constitution], shall be void." The Michigan case of *Thompson v. Auditor General,* 261 Mich. 624, 247 N.W. 360, cites and follows earlier decisions of the Supreme Court of Michigan holding that the 1908 constitution of that state prohibits efforts of the legislature to remit a part of a tax levy on some but not all property levied upon. *In State ex rel. Matteson v. Luecke,* 194 Minn. 246, 260 N.W. 206, the court held that the state constitution of Minnesota was violated by an effort of the legislature to permit delinquent taxpayers for certain specified years, to discharge their obligation by payment of a portion of the tax due without interest or penalty. The Idaho case of *State ex rel. Anderson v. Rayner,* 60 Ida. 706, 96 P.2d 244, concerns excise taxes and has no application whatever.

In *San Bernardino County v. Way,* 18 Cal.2d 647, 117 P.2d 354, the Supreme Court of California held that the California State Constitution had been construed in earlier decisions as prohibiting legislative remission of taxes. Nothing was said in the decision to indicate that the court had departed from the earlier

holdings in *People v. Bank of San Luis Obispo* (1910) 112 Pac. 866, and *Coombs v. Franklin* (1931) 1 P.2d 992, holding that the repeal of a statute without a general or special saving provision destroys all rights existing under it which have not become final.

Clements v. Peerless Woolen Mills, 197 Ga. 296, 29 S.E.2d 175, involves the statutory right of the Tax Commissioner to collect commissions on taxes remitted by law and has no application here. *Opinion of the Justices, No. 89*, 251 Ala. 96, 36 So.2d 480, advised the Governor of Alabama respecting the application of a state constitutional provision prohibiting remission or release or application to the state "except doubtful claims." No such situation is involved here.

The Montana Cases Cited by Petitioner on the Constitutional Question

The fallacy of Petitioner's position is explicitly demonstrated by Petitioner's citation of the Montana case of *State ex rel. Kain v. Fischl, County Treasurer*, 94 Mont. 92, 20 P.2d 1057 (1933). Montana like Texas and many other states has a constitutional provision prohibting the legislature from remitting, releasing, or postponing an obligation of the state or county. The Montana legislature authorized property owners whose property had been sold to the county for delinquent taxes, penalty and interest, to redeem their property without payment of penalty or interest, in cases (1) where the county had made no sale or assignment of the property, and (2) redemption was made on or before November 30, 1953. The act was held in violation of the provision of the Montana constitution above mentioned.

The court also pointed out that the Montana act violated the Equal Protection Clause of the Fourteenth Amendment because delinquent taxpayers were "of the same class" and the act required full payment from some delinquents and not from others, since the act permitted redemption only by "those whose property had been struck off to the county * * * and no assignment of the certificate of sale had been made * * * and who paid their delinquent taxes on or before November 30, 1953." Other delinquents were denied the benefits of the act.

But the Montana court saw no similar violation of the Fourteenth Amendment in the earlier case of *Westchester Fire Insurance Co. v. Sullivan, County, Treasurer,* (1912) 121 Pac. 472, 473, where it held that the repeal of a tax statute "had the effect of blotting it out as completely as if it had never existed" and that taxes due under the act at the time of its repeal were not required to be paid. The court negatived a violation of the Fourteenth Amendment by stating:

> "There is no suggestion by Counsel on either side that the repealing act violates any provision of the Constitution touching the taxation of property, * * * ."

The same court that announced the decision in *State ex rel. Kain v. Fischl, County Treasurer, supra,* upon which Petitioner relies, presided over by the same Chief Justice and with the same Associate Justices participating, cited *Westchester Fire Insurance Co. v. Sullivan, County Treasurer, supra,* with approval in *Continental Supply Company v. White* (1932) 12 P.2d 569, 573; *State ex rel. Snidow v. State Board of Equalization* (1933) 17 P.2d 68, 72; *Standard Oil Company*

of California v. Idaho Community Oil Company (1933) 27 P.2d 173, 176, and *State v. Wilds* (1935) 41 P.2d 8, 9.

Finally the Montana case of *State ex rel. Kain v. Fischl, County Treasurer, supra,* cited by Petitioner, was specifically overruled on the specific point of the violation of the Fourteenth Amendment by *State ex rel. Sparling v. Hitsam, County Treasurer* (Mont. 1935) 44 P.2d 747, also cited by Petitioner on page 14 of its Brief.

Second Question Presented

Petitioner's second question as presented on page 16 of its Brief is identical with the question considered as determination by the Circuit Court in this case, although couched in slightly different words. In substance it challenges the holding below that "the saving's section of the Repealing Act overrides the General Saving Statute."

It is difficult to improve on the reasoning advanced by the court below in support of its decision on this point. It is impossible to challenge it successfully. The Circuit Court after quoting the Repealing Act and the General Saving Statute of Alaska (Appendix A and B) held that "the saving section of the Repealing Act overrides the General Saving Statute" (R. 82). In support of this conclusion the Appellate Court points to the words in the title of the Repealing Act "excepting from repeal certain taxes and tax exemptions" (R. 82) and states as follows:

> "In John J. Sesnon Co. v. United States, 9 Cir. 1910, 182 F. 573, 576, certiorari denied, 1911, 220

U.S. 609, a case that came to this court from Alaska, Judge Morrow observed:

" 'Where doubt exists as to the meaning of the statute, the title may be looked to for aid in its construction.'

"In the repealing statute before us, the participial phrase, *'excepting* from repeal' certain taxes, etc., without any qualification to the word 'excepting,' indicates that the term is to be taken in its ordinary restrictive sense.

"Considering the repealing act as a whole, we should bear in mind that being a special or, in the words of the Supreme Court, a *'specific'* enactment, it qualifies and furnishes exceptions to the *general* repeal law of Alaska—Section 19-1-1, dealing with the 'Effect of repeals or amendments,' *supra.*

"More than threescore and ten years ago, this rule was already 'well settled' in Anglo-American law.

"In *Townsend v. Little,* 1883, 109 U.S. 504, 512, the court observed:

" 'According to the well settled rule, that general and specific provisions, in apparent contradiction, whether in the same or different statutes and without regard to priority of enactment, may subsist together, *the specific qualifying and supplying exceptions to the general,* this provision for the execution of a *particular* class of deeds is *not* controlled by the law of the territory requiring deeds *generally* to be executed with two witnesses.' [American and English authorities cited.] [Emphasis supplied.]

"The principle is merely a corollary of the familiar maxim, *Expressio unius est exclusio alterius,*

as was poined out in *Rybolt v. Jarrett*, 4 Cir., 1940, 112 F.2d 642, 645:

" 'There is some force here in the maxim *Expressio unius est exclusio alterius.* When in a statute of such clean cut restrictive force, the legislature undertook to make certain explicit exceptions, it seems a fair implication that the legislature intended to exclude other exceptions, and thus to make the statute say what it means and mean what it says.'

"Similarly, in *Jones v. H. D. & L. K. Crosswell*, 4 Cir., 1932, 60 F.2d 827, 828, it was said:

" 'Being exceptions carved out of the general rule, intangible property not *specifically* mentioned as being tangible property must be excluded. The maxim *"expressio unius est exclusio alterius'* applies. It is a well-settled principle of statutory construction that the expression of one thing excludes others not expressed. [Many cases cited.]' [Emphasis supplied.]

"The principle is well established in California. In *Los Angeles Brewing Company v. City of Los Angeles*, 1935, 8 C.A.2d, 391, 398, cited in the Stanford Law Review of January, 1949, Volume 1, Number 2, Page 371, Note 2, the court remarked:

" 'As section 22 or Article XX [of the Constitution of California] *was adopted last, as it is special in dealing with this subject of the control, licensing and regulating of "the manufacture, sale, purchase, possession, transportation and disposition of intoxicating liquor within the state"* and as it shows an intention to remove the licensing for revenue of those so dealing in intoxicating liquors from the realm of a municipal affair to that of a matter of general state-wide concern, its provisions

must be held to control over those of section 6 of article XI of the Constitution [authorizing cities and towns to legislate "in respect to municipal affairs"] and vest in the state the exclusive and sole right to license for the purpose of revenue those engaged in the business of manufacturing, dealing in or handling intoxicating liquors.' [Emphasis supplied.]"

The court then proceeds to a discussion of what it terms "a leading and oft quoted decision that applies the venerable maxim to the precise question that we are here considering; namely, the conflict between the general repeal provision and a special repeal provision." (R. 84).

The reference is to *State v. Showers,* 1885, 34 Kan. 269, 8 Pac. 474, 476-477, and the Appellate Court quotes extensively from the decision in that case (R. 84, 85, 86) and concludes this phase of its opinion in the following words:

"Both on reason and authority, therefore, we hold that §2 of Chapter 22 of 1953, the repealing statute, means precisely what it says; namely, that Chapter 10 of the Session Laws of Alaska, 1949, shall 'be and it is hereby repealed,' except 'any taxes which have been levied and assessed by any municipality, school or public utility district,' etc., including such taxes levied and assessed for the 'current fiscal year'—taxes which are not in controversy here, and which alone are saved from repeal.

"With the above exclusive exception Chapter 10, Session Laws of Alaska, 1949, is no longer of any

force or effect—as to past, present, or future years." (R. 87).[1]

The Third Question Presented

Petitioner, by its third question presented, asks this Court to consider as evidence in this case, House Bill No. 3 of the Twenty-first Session of the Alaska Legislature, which was offered in evidence in the trial court during the oral argument on Respondent's Motion to Dismiss and was rejected by the trial court (R. 46, 47). The Circuit Court found no prejudicial error (R. 89). Petitioner also asks this court to consider as evidence in this case Senate Bill No. 5 of the Alaska Legislature which was *not* offered in evidence in the trial court (R. 87). In the Appellate Court Petitioner assigned this action as error (R. 72) but in this court Petitioner asks that the documents be considered although not in the record and although Respondents have had no opportunity to cross-examine or rebut by introducing other documents and statements which are available. The Appellate Court found no error in the rejection and further concluded that the proffered documents shed no light on the controversy not available from an inspection of the legislative journals which may be judicially noticed (R. 87, 88, 89). Respondents agree with the Appellate Court's conclusion.

This case is not open here for the reception of evidence. In fact it never was in the trial court either. The

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[1] In further support of its position the Appellate Court calls attention to *Wilmington Trust Co. v. United States*, Del. 1928, 28 F.2d 205, 208, holding "that nothing should be saved except what they [the legislature] expressly stated should be saved"; and also to *Ainsworth v. Bryant*, 1949 34 Cal.2d 465, 472, 473, 211 P.2d 564, 568; 50 Am. Jur. Sec. 528, page 535; 82 C.J.S. Sec. 440(a) page 1015, dealing with the general application of the maxim "*expressio unius*."

trial court granted a Motion to Dismiss the complaints and the Territory elected to stand on the pleadings and appeal (R. 80). The documents clearly cannot be considered here and if they were the decision of the case would not be affected. The legislature did not want to "abrogate and repeal all accrued and unpaid taxes" as provided in House Bill No. 3 as introduced. It wanted to except from the repeal and save taxes levied in the past or to be levied in the future pursuant to the Act repealed, by municipalities, school and public utility districts. The Legislature amended the bill accordingly.

The Rules of Statutory Construction Advanced by Petitioner

Petitioner sets forth in its brief what it terms "four fundamental canons of [statutory] construction."

The First Rule (Pet. Br. p. 16)

The first rule of construction advanced is that "when an act is susceptible of one or more constructions, one of which is of doubtful validity, the courts should adopt the valid interpretation."

But Petitioner assumes that the act in question is of doubtful validity. By the first question presented in its brief (Br. 2) Petitioner asserts that the Repealing Act as construed below is unconstitutional. If it is unconstitutional it must fall and the court will not give it a construction not warranted by its terms in order to avoid such a result.

The rule of construction asserted by Petitioner may be correct but it has no application here. The Repealing Act by its plain terms saves some taxes and not others. If this offends the Constitution then the Act is

void and the courts are powerless to change it. Rewriting the Act is a function of the Legislature. The cases cited by Petitioner may support the rule of construction stated by Petitioner but neither they nor the rule are applicable here.

The Second Rule **(Pet. Br. p. 16)**

The second rule of construction advanced by Petitioner is that "an unjust result is to be avoided in statutory construction." But who is to determine what is just and what is unjust. Many people in many times have felt that many legislative enactments are "unjust." Counsel for Petitioner on behalf of another branch of the Alaska territorial government contends that the Act of the Alaska Territorial Legislature was "unjust" and that the courts should change it.

Counsel for Petitioner seeks to justify his position by asserting that the Repealing Act is "ambiguous." An ambiguous statute is one that on its face is subject to two meanings. The Repealing Act repealed the Alaska Property Tax Act but made the repeal inapplicable to certain taxes and tax exemptions. This is what it says and this is what it means. No ambiguity can be detected in this respect. The Circuit Court held that "the repealing statute, means precisely what it says" (R. 87) and that "the saving section of the repealing act overrides the general saving statute" (R. 82). It is this last holding of which Petitioner complains. It is the legal effect of the Repealing Act and not its grammatical construction which Petitioner seeks to avoid. It is true that both the trial and Circuit Courts applied well-established rules of statutory construction including recourse to the title which by reason of section 8

of the *Alaska Organic Act,* Vol. 1, P. 55, ACLA 1949, is a part of the Act itself. This does not mean that they found the Act ambiguous.

The dissenting opinion finds the Act ambiguous "in its meaning and in the motives inspiring its enactment" (R. 91). The motives which inspired the legislature to enact the Repealing Act are not on review here. The construction placed on the Act by the dissenting opinion is treated elsewhere herein.

The Third Rule **(Pet. Br. p. 19)**

The third rule of construction advanced by the Petitioner is that "tax remissions are strictly construed and founded upon clear language."

But the Repealing Act does not purport to "remit" any taxes and the authorities cited by the Petitioner in support of the rule have no application. The Repealing Act repeals a tax statute and under the common law the taxes due and unpaid on the date of the repeal, unless saved, fell with the repeal and in the words of the Appellate Court are "no longer of any force, or effect—as to past, present or future years" (R. 87).

The Fourth Rule **(Pet. Br. p. 19)**

The fourth rule asserted by Petitioner is that "a special saving clause does not override a general saving statute in the absence of express terms or *clear* implication" (B. 19). The cases cited by Petitioner do not support the rule and furthermore they construe the *Federal Saving Statute,* Sec. 29 and 109, Title 1, U.S.C.A., which is quite different from the *Alaska Saving Statute,* Sec. 19-1-1 A.C.L.A. 1949, with which we

are concerned here. The Federal Saving Statute reads as follows:

> "Repeal of statutes as affecting existing liabilities. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, *unless the repealing Acts shall so expressly provide,* and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." (Emphasis supplied)

We have emphasized the words *"unless the repealing Act shall so expressly provide."* No similar words are found in the Alaska Saving Statute. They are not missing by accident either. Prior to 1947 Alaska had a General Saving Statute identical with the Federal Saving Statute. See Chap. 7 SLA 1929. The 1929 act was repealed and the present saving statute substituted for it by Chap. 18, SLA 1947 now found in the Alaska Compiled Laws Annotated of 1949 as Sec. 19-1-1 thereof. Therefore, cases cited by Petitioner construing the Federal act are not helpful here. The contrast has been frequently pointed out by the Federal Courts.

State v. Showers (Kan. 1885) 34 Kan. 269, 8 Pac. 474, quoted from at length in the decision of the Appellate Court in this case construes the General Saving Statute of Kansas which is identical in effect with the General Saving Statute of Alaska.

In *United States v. Chicago, St. Paul, Minneapolis & Omaha Railway* (D.C. Minn. 1907) 151 Fed. 84, the court after quoting both the Federal Saving Statute and the Kansas Saving Statute (which is identical in

effect with the Alaska Saving Statute) said on page 90 of its decision:

> "It will be noted that the words of the Kansas statutes above quoted are far from identical with those of the federal statutes now being considered. The Kansas statute of construction contains the words 'unless such construction would be inconsistent with the manifest intent of the Legislature, or repugnant to the context of the statute,' and thus leaves open to the courts the application of the recognized canons of construction to ascertain from the language of the repealing statute and the context of the statute the intent of the Legislature. There are no such words in section 13, and the Kansas statute does not provide, as does section 13, that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability under the repealed statute, unless the repealing act shall so expressly provide. Under the Kansas statute it was not necessary to expressly provide in the repealing act that a certain class of offenders shall be released from prosecutions, but under the federal statute it is imperative that there should be such an express provision. The words 'unless the repealing act shall so expressly provide' differentiates the two statutes, and in my opinion make the Kansas case of little, if any, value in determining the question now under consideration."

See also *Great Northern Ry. Co. v. U. S.* (8th Cir. 1907) 155 Fed. 945; *U. S. v. Chicago, St. Paul, Minneapolis & Omaha Railway* (D.C. Minn. 1907) 151 Fed. 84; *U. S. v. Standard Oil Co.* (D.C. Ill. 1907) 148 Fed. 719, where *State v. Showers* was quoted and the General Saving Statute and Kansas contrasted from the

Federal Saving Statute. This is the same contrast which exists between the Federal and Alaska General Savings Statutes.

But there is another difficulty with the rule asserted by Petitioner. Petitioner contends that a special saving clause does not override a general saving statute in the absence of expressed terms or *clear* implication. *Hertz, Collector v. Woodman* (1910) 218 U.S. 205, 30 S.Ct. 621, and *Great Northern Ry. Co. v. U. S.* (1908) 208 U.S. 452, 28 S.Ct. 313, are cited in support of the rule. Both of these cases state the rule differently with respect to the extent of the implication required. Both say that since the Federal Saving Statute "has only the force of a statute" its provisions cannot justify a disregard of the will of Congress as manifested, either expressly or by *necessary* implication, in a subsequent act. But that the provisions of the Federal Saving Statute "are to be treated as if incorporated in and as a part of subsequent enactments, and therefore, under the general principle of construction requiring, if possible, that effect be given to all parts of a law," the Federal Saving Statute "must be enforced unless, either by express declaration or *necessary* implication," arising from the terms of the law as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions of [the Federal Saving Statute].

This identical language is found in both cases. "Clear" and "necessary" are not interchangeable words.

Finally Petitioner on page 23 of its brief makes this strange statement—

"Thus it is the position of the Territory of Alas-

> ka that the 'exception' found in Chap. 22 SLA 1953, is prospective, saving nothing that presently exists."

The "exception" referred to is Section 2(a) of the Repealing Act applies to two separate set of circumstances as follows: "(1) Sec. 1 of this act shall not be applicable to

> 'any taxes which have been levied and assessed by any municipality, school, or public utility district under the provisions of Chapter 10, Session Laws of Alaska 1949, as amended,'
>
> or
>
> 'which are levied and assessed during the current fiscal year of such municipality, school or public utility district.'"

To say that the saving of "any taxes which have been levied and assessed * * * under the provisions of Chap. 10 * * * " is not retrospective is in effect to deny the force of the English language. By the same token the second part of the exception dealing with taxes "which are levied and assessed during the current fiscal year" definitely applies prospectively.

Other Questions

The trial court ruled that no personal action could be maintained against these respondents for the taxes in question and that "neither the tax nor the remedy survive the repeal" and that "in view of this decision the question of the Statute of Limitations need not be considered." *Territory of Alaska v. American Can Co.*, 16 Alaska 71, 82, 137 F.Supp. 181. The trial court's holding that no personal action would lie and that no remedy survived the repeal was specified as error on appeal to

the Circuit Court (R. 71, 82). The Circuit Court stated that the question of personal liability and the survival of a remedy were presented by the appeal but since the taxes were no longer in force or effect the other questions were not passed upon. These questions are not covered in the Petition for Certiorari and are not before this Court. Neither Petitioner nor respondents have asked for their consideration or determination. They are meritorious. 55-2-7-ACLA 1949, *City of Yakutat v. Libby, McNeill & Libby,* 13 Alaska 378, 98 F. Supp. 101, *Bridges v. United States,* 346 U.S. 209, 97 L.ed. 1557, 73 S.Ct. 1055, *Schmuch v. Hartman,* 222 Pa. 190, 195, 70 Atlantic 1091, 1092.

CONCLUSION

The Judgment should be affirmed.

Respectfully submitted,

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APPENDIX A

SESSION LAWS OF ALASKA, 1953

Chapter 22

AN ACT

(H.B. 3)

To repeal the Alaska Property Tax Act enacted by Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949; excepting from repeal certain taxes and tax exemptions; and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, be and it is hereby repealed.

Section 2. Section 1 of this Act shall not be applicable to:

(a) any taxes which have been levied and assessed by any municipality, school or public utility district under the provisions of Chapter 10, Session Laws of Alaska 1949, as amended, or which are levied and assessed during the current fiscal year of such municipality, school or public utility district; and

(b) any exemptions from the taxes referred to in subsection (a) of this section, which have been granted under the provisions of Section 6(h) of Chapter 10, Session Laws of Alaska 1949.

Section 3. An emergency is hereby declared to exist and this Act shall be in full force and effect for and after the date of its passage and approval.

APPENDIX B

ALASKA COMPILED LAWS ANNOTATED, 1949

TITLE 19

§19-1-1. Effect of repeals or amendments. The repeal or amendment of any statute shall not affect any offense committed or any act done or right accruing or accrued or any action or proceeding had or commenced prior to such repeal or amendment; nor shall any penalty, forfeiture or liability incurred under such statute be released or extinguished, but the same may be enforced, continued, sustained, prosecuted and punished under the repealing or amendatory statute save as limited by the ex post facto and other provisions of the Constitution, in which event the same may be enforced, continued, sustained, prosecuted and punished under the former law as if such repeal or amendment had not been made. [L. 1947, ch. 18, §1, p. 60]

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'R.SEE284 24/23 NL COLLECT=JUNEAU ALASKA 31=

ESKIL ANDERSON=

:105 WEST SIXTH SPOKANE WASH=

=REURTEL PAYMENTS 1950 PROPERTY TAX NOT BEING ACCEPTED PENDING DECISION BY CIRCUIT COURT OF APPEAL OF DECISION OF DISTRICT COURT IN FAIRBANKS=

:M P MULLANEY TAX COMMISSIONER.

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE